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IN THE

Supreme Court of the United States

October Term, 1953

No.

D. O. NORTON & SON AND UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, *Petitioners,*

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA AND WILLIAM R. BITER, *Respondents.*

APPENDIX TO PETITIONERS' BRIEF.

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

No. AG 20595

WILLIAM RILEY BITER, *Applicant,*

v.

D. O. NORTON & DELBERT L. NORTON (D. O. NORTON & SON BUILDING CONTRACTORS), *Defendant Employer,*

THE INDUSTRIAL COMMISSION OF ARIZONA, *Defendant Insurance Carrier.*

Certification

I, J. E. Gavin, Secretary of the Industrial Commission of Arizona, do hereby certify that I have compared the annexed instrument with the original record thereof, as the same appears in the office of the Industrial Commission of Arizona, and that the same is a full, true and correct copy of such record.

WITNESS my hand and seal of the Industrial Commission of Arizona, this 15th day of January, 1954.

J. E. GAVIN
J. E. Gavin,
Secretary

SEAL

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

Case No. AG20595

WILLIAM RILEY BITER, *Applicant,*

v.

D. O. NORTON & DELBERT L. NORTON (D. O. NORTON & SON BUILDING CONTRACTORS), *Defendant Employer,*

THE INDUSTRIAL COMMISSION OF ARIZONA,
Defendant Insurance Carrier.

Findings and Award for Temporary Disability

The above-named applicant having made claim for compensation under the Workmen's Compensation Law of the State of Arizona, and said claim and the evidence and reports bearing thereon having been considered, this Commission now makes its findings and award as follows:

FINDINGS

1. That the above-named applicant on October 19, 1950 sustained a personal injury by accident arising out of and in the course of his employment.

2. That at the time of said accident said applicant was employed in the State of Arizona by the above-named defendant employer, who was insured against liability for the payment of accident benefits and compensation under said law by the above-named defendant insurance carrier.

3. That said personal injury entitles said applicant to accident benefits (medical) until May 18, 1951.

4. That said applicant had persons dependent upon him for support at time of said injury.

5. That the average monthly wage of said applicant prior to said personal injury was the sum of $144.30.

6. That said applicant is entitled to compensation for total temporary disability from October 20, 1950 to February 17, 1951 in the sum of $419.06; and partial temporary disability from February 18, 1951 through March 19, 1951 in the sum of $93.90; or a total sum of $512.96.

7. That the medical evidence reflects that said applicant has no physical disability resulting from said accident.

AWARD

Award is hereby made payable to said applicant by the above-named defendant insurance carrier, as follows:

1. Accident Benefits.

2. The sum of $512.96, all of which has been paid.

IT IS ORDERED that any payments of accident benefits and compensation heretofore made on account of said injury are to be credited upon this award and are deductible therefrom; that any party aggrieved by this award may apply for rehearing of the same by filing written application therefor at the office of this Commission, within TWENTY (20) DAYS after the service of this award, as provided by the rules and regulations of this Commission; and that jurisdiction be and it is hereby reserved to alter, amend or rescind this award upon good cause.

THE INDUSTRIAL COMMISSION OF ARIZONA

By s/ J. J. O'NEILL
s/ FRED E. EDWARDS
s/ B. F. HILL
Commissioners.

Dated at Phoenix, Arizona,
this 4th day of June, 1951.

• • • • • • • • • •

Affidavit

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss:

COMES NOW Robert E. Yount, who being duly sworn, deposes and says:

I am attorney and referree for the Industrial Commission of Arizona. I have reviewed the entire file in the above entitled matter and find that on the 4th day of June 1951, a Findings and Award for Temporary Disability was entered therein; that said Award provided:

> "IT IS ORDERED that any payments of accident benefits and compensation heretofore made on account of said injury are to be credited upon this award and are deductible therefrom; that any party aggrieved by this award may apply for rehearing of the same by filing written application therefor at the office of this Commission, within TWENTY (20) DAYS after the service of this award, as provided by the rules and regulations of this Commission; and that jurisdiction be and it is hereby reserved to alter, amend or rescind this award upon good cause."

That service of said Award was duly made on all parties thereto and that no protest or petition for rehearing was filed therein within twenty days after the service of said Award nor was any petition for writ of certiorari filed with the Supreme Court of Arizona for the review of said Award within thirty days after its rendition as provided by Section 56-972, A.C.A. 1939. Further, deponent sayeth not.

ROBERT E. YOUNT
Robert E. Yount, *Referee*
The Industrial Commission
of Arizona
Arizona State Office Building
1640 West Adams Street
Phoenix, Arizona

SUBSCRIBED AND SWORN to before me this 25th day of January, 1954.

.....
Notary Public

My commission expires:
January 28, 1955.

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA

Claim No. 52-LA-129-627

WILLIAM R. BITER, *Applicant*

vs.

D. O. NORTON AND SON; ARIZONA INDUSTRIAL ACCIDENT COMMISSION & THE UNITED STATES FIDELITY AND GUARANTY CO., *Defendants*

Excerpts from Minutes of Hearing

THIS CAUSE came on regularly for hearing on October 6, 1952, at 10:30 A. M., at the District Court of Appeals, 263 Third Street, San Bernardino, California, before SHERMAN GRANCELL, Referee.

Felda B. Wilson, Reporter

* * * * * * * * * * *

The Referee: Is your present address, P O Box 32, Parker, Arizona?

Mr. Biter: That's right.

* * * * * * * * * * *

By the Referee:

* * * How long have you resided at Parker, Arizona?

A. Since 1949.

* * * * * * * * * * *

Certification

I, William Kaplan, Assistant Secretary of the Industrial Accident Commission, do hereby certify that the attached are full, true and correct photostatic copies of

Order Dismissing Party Defendant and Findings and Award, dated March 3, 1953;

Report of Industrial Accident Commission, Panel Two on Order Granting Defendants' Petition for Reconsideration and on Decision After Reconsideration, dated May 8, 1953;

Order Granting Defendants' Petition for Reconsideration and Decision After Reconsideration, dated May 3, 1953.

These documents are certified for evidence only and are not to be filed with the County Clerk's Office as provided by Section 5806 of the Labor Code.

Attest my hand and the seal of the Industrial Accident Commission of the State of California.

WILLIAM KAPLAN
Assistant Secretary

dated at Los Angeles, California
January 20, 1954
dlr

Certified photostatic copies to—
CLAUSEN, HUNTER & LILJESTROM, *Attys.*
756 South Broadway
Los Angeles, California

• • • • • • • • • • •

Order Granting Defendant's Petition for Reconsideration and Decision After Reconsideration

GOOD CAUSE APPEARING THEREFOR:

IT IS ORDERED that Petition for Reconsideration, filed herein by defendants on March 23, 1953, be and it is hereby GRANTED.

Reconsideration having been granted and it appearing to the satisfaction of this Commission that no good cause exists for the taking of further testimony and the original cause having been considered and redetermined upon the existing record,

IT IS ORDERED that as and for Decision after Reconsideration, Findings and Award filed herein on March 3, 1953 be and they are hereby rescinded, and the following substituted therefor:

FINDINGS OF FACT

1. William R. Biter, born June 22, 1905, while employed as a laborer on October 19, 1950, at Parker Dam, California, by D. O. Norton & Son, sustained injury arising out of and occurring in the course of his employment, being to his back.

At said time, said employer's compensation insurance carrier covering said injury was United States Fidelity & Guaranty Company, and both the employer and the employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Laws of the State of California.

2. Said injury resulted in new and further disability, causing temporary total disability entitling applicant to $30.00 per week beginning November 1, 1951 to and including January 7, 1953, and thereafter during the continuance of disability or until the further Order of this Commission, based upon maximum earnings.

3. Defendant insurance carrier is entitled to credit of $216.00 heretofore advanced against temporary disability indemnity.

4. Applicant is in need of and entitled to such further medical and surgical treatment as is reasonably required to cure or relieve from the effects of said injury, at the expense of the defendants.

5. Applicant is entitled to be reimbursed for the cost of self-procured medical treatment in the sum of $92.00.

6. The Industrial Commission of Arizona is neither a necessary nor proper party defendant and is entitled to be dismissed and discharged herefrom.

7. Award of compensation made by The Industrial Commission of Arizona is not res judicata.

8. The claim herein for additional compensation by reason of new and further disability is not barred by the Statute of Limitations.

9. Claim for compensation benefits for periods prior to November 1, 1951 is barred by the Statute of Limitations.

10. Applicant's attorney is entitled to a lien against unpaid compensation for the reasonable value of his services in the sum of $150.00.

Award

Award Is Made in favor of William R. Biter against United States Fidelity & Guaranty Company of the sum of $30.00 per week beginning November 1, 1951 to and including January 7, 1953 and thereafter during the continuance of disability or until the further Order of this Commission, together with interest as provided by law, less the sum of $216.00 heretofore paid thereon and less the sum of $150.00 payable to Thomas Morris, as attorney's fees; together with such further medical and surgical treatment as is reasonably required to cure or relieve from the effects of said

injury, as provided in Finding No. 4; together with reimbursement for the cost of self-procured medical treatment in the sum of $92.00.

IT IS ORDERED that The Industrial Commission of Arizona be and it is hereby dismissed and discharged herefrom.

Defendant is further Ordered to report to this Commission on Form C-6, served herewith, within ten days after the cessation of compensation payments under the above continuing Award. Copies of said form and copies of all medical or other reports filed with this Commission in connection with said form are to be served on all adverse parties before filing with this Commission.

INDUSTRIAL ACCIDENT COMMISSION
OF THE STATE OF CALIFORNIA

RALPH E. MASTER
A. RAEINE
E. B. WEBB
Commissioners

Dated at Los Angeles, California May 8, 1953.
52-L.A. 129-627
5.6

* * * * * * * * * * *

Report of Industrial Accident Commission, Panel Two On Order Granting Defendants' Petition for Reconsideration And On Decision After Reconsideration

This matter is pending before the Industrial Accident Commission, Panel Two, on defendants' Petition for Reconsideration.

William R. Biter, applicant, was employed as a laborer at Parker Dam, California, by D. O. Norton & Son, the contract of employment having been entered into in the State of Arizona. He was injured on October 19, 1950, and it has been stipulated that the injury occurred in the State of California. The employer's insurance carrier in Arizona,

at time of injury, was the Industrial Commission of Arizona and in California was United States Fidelity & Guaranty Co.

Applicant filed Workman's Claim for Compensation for Injury with the Industrial Commission of Arizona, alleging that on October 19, 1950, "when lifting cement sacks and pitching them on a platform, foot slipped and snapped left hip and back." He was treated by Dennis Gallaher, M. D., of Parker, Arizona, and was admitted to Memorial Hospital, Phoenix, on February 5, 1952, where he remained 12 days, receiving conservative treatment, including Buck's traction. He was seen by Dr. William A. Bishop, who thought there was evidence of nerve root pressure, in addition to functional overlay. Applicant was examined on May 17, 1951, by Dr. Bishop, Dr. McGrath, a psychiatrist, and Dr. Moore, medical advisor. The examiners were of the opinion that any objective evidence of disability resulting from injury had completely cleared and simultaneously the subjective complaints had increased and spread; this, with the positive evidences of malingering, strongly suggests a purely conscious exaggeration of complaints. The examiners concluded that there are no objective residuals from any injury sustained in the accident, no treatment is indicated and there is no objective evidence of disability due to such injuries. Dr. Bishop had reported on February 19, 1951, that applicant should return to light work, which would be necessary for his rehabilitation.

On June 4, 1951, the Industrial Commission of Arizona issued Findings and Award for temporary disability, finding injury arising out of and occurring in the course of employment on October 19, 1950; that applicant was entitled to medical benefits until May 18, 1951; that he was entitled to compensation for total temporary disability from October 20, 1950, to February 17, 1951, in the sum of $419.06 and partial temporary disability from February 18, 1951, through March 19, 1951, in the sum of $93.90, or a total sum of $512.96.

Printed Finding No. 7 states "that the medical evidence reflects that said applicant has no physical disability resulting from said accident." The Findings and Award states upon its face: ". . . that jurisdiction be and it is hereby reserved to alter, amend or rescind this award upon good cause."

Applicant filed Application for Adjustment of Claim with the California Industrial Accident Commission on July 22, 1952, alleging injury on October 19, 1950, and further alleging Total Disability. He joined as a party defendant the Industrial Commission of Arizona and on September 30, 1952, this defendant filed Motion to Dismiss, averring that applicant had filed claim with the Arizona Commission, that his claim was found to be compensable and benefits were provided for in Findings and Award under the Arizona Workmen's Compensation Law; said award became final and any jurisdiction for reopening of applicant's claim is reserved to the Industrial Accident Commission of Arizona under the provisions of Arizona Law. This defendant was dismissed from the proceeding.

At hearing it was stipulated that applicant was employed by defendant employer on the date of injury; that injury occurred in the State of California; that earnings were maximum; and the following issues were specially pleaded:

1. Statute of Limitations.
2. Res Judicata.
3. Need for further medical treatment.
4. Whether U. S. Fidelity & Casualty Co. is entitled to credit for payments made to the applicant by Industrial Commission of Arizona.

All other facts were placed in issue.

Findings and Award issued on March 3, 1953, the referee finding injury on October 19, 1950, arising out of and occurring in the course of applicant's employment as a laborer, by defendant employer, at Parker Dam, California. Total temporary disability indemnity was awarded

for the period beginning October 20, 1950, to and including January 7, 1953, and continuing; further medical treatment was awarded; credit was given for the sum of $512.96 paid by the Industrial Commission of Arizona; and it was found that the Industrial Commission of Arizona is not res judicata of the parties herein.

Defendants filed Petition for Reconsideration, contending:

(A) That applicant's claim is barred by the California Statute of Limitations (Labor Code sec. 5405) in that his Application was filed more than one year after date of injury and more than one year from the date of last furnishing of compensation benefits by the Industrial Commission of Arizona;

That applicant's complaints have been continuous and substantially the same and that he has never been without such complaints since the inception of alleged injury.

(B) That the award rendered by the Industrial Commission of Arizona is a final judgment and award in that state, is res judicata, and is a complete bar to any further proceedings in the State of California.

The Panel will consider first the contention that the Arizona award constitutes a final judgment and award which is res judicata in that state and a complete bar to any further proceedings in the State of California; that under the Full Faith and Credit clause of the Federal Constitution, the State of California is required to recognize this award and give to it the same effect here which it has in the State of Arizona.

Article 4, Sec. 1, of the Constitution of the United States provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," and further provides that "Congress

may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Pursuant thereto, Congress has provided that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." (28 U.S.C.A. Sec. 687).

The Industrial Commission of Arizona is not a court of general jurisdiction, but it exercises judicial functions (*Kasalica* v. *Ind. Com.*, 65 Ariz. 28) and in making awards it acts judicially. (*Guy F. Atkinson Co.* v. *Kinsey*, 61 Ariz. 127). Whether or not an award of that Commission constitutes a "judicial proceeding" within the Full Faith and Credit clause of the Federal Constitution need not be decided for the award constitutes a "public record" of that state, and such public records are within the constitutional mandate. (*Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430; 9 Cal. Comp. Cases 13).

Defendants contend that the award of compensation made by the Arizona Commission has the effect of a final judgment or award, unless and until it is reversed, changed, or modified by rehearing, or upon appeal. The record indicates that no petition for rehearing was filed with the Arizona Commission nor was appeal taken to the Supreme Court. The question presented is whether the award of the Arizona Commission is res judicata as to any and all further proceedings in that state; to the extent that it is res judicata in Arizona, it is res judicata in any other state wherein action may be brought. (*Magnolia Petroleum Co.* v. *Hunt*, supra). The Arizona Commission awarded applicant both total and partial temporary disability indemnity, payment terminating on March 19, 1951. The Award further provides, upon its face, that jurisdiction is reserved to alter, amend or rescind this award upon good cause.

The applicable Arizona case law is expressed in the following decisions:

"The Commission's judgment expressed in an award upon the facts then existing, unless reversed on rehearing, or decision of the Supreme Court, is res judicata."

(*Zagar* v. *Ind. Com.* supra; *Brown* v. *Ind. Com.*, 48 Ariz. 161)

"An award made either on an original application or for adjustment of compensation, which has not been brought before the Supreme Court for review, in the proper manner and at the proper time, is res judicata as to the issues determined by the award."

(*Harambasic* v. *Barrett, Hilp, & Macco Corp.*, 58 Ariz. 319).

"The Workmen's Compensation Law does not specifically confer on the Commission a continuing power over its awards, as is the case in compensation laws generally, but we think such power is impliedly conferred by Section 56-973."

(*Zagar* v. *Ind. Com.*, 40 Ariz. 479).

"The Industrial Commission has continuing power over its awards, which power can be exercised only by showing of additional and new disability attributable to the accident not known at original hearing and which could not have been considered in making final award."

(*Radaka* v. *U. S. Smelting, Refining & Mining Co.*, et al. 62 Ariz. 464).

"It is common knowledge that the results of physical injuries are often not determinable at the time they are received, and to require that they be then stated is to demand the performance of the impossible. The original award is not final in the sense that, regardless of the future physical condition of the workman, neither he nor the insurer should be permitted to show such physical change. For this reason the Commission not only has the right, but it was its legal duty to retain jurisdiction of the case for further action and award if the facts should so warrant."

(*Zagar* v. *Ind. Acc.* supra).

"An employee's application for increase or re-arrangement, or for additional compensation because of new

and additional disability, is not required to be made within one year from the date of the original injury."

(*Zagar* v. *Ind. Com.* supra; *Doby* v. *Miami Trust Co.* 40 Ariz. 490).

It appears that the award made in this case by the Arizona Commission has finality only as to the issues determined by the award. It is not final to the extent that it bars reopening for additional compensation, upon a showing of physical change resulting from the injury. In determining whether applicant's injury has resulted in new and further disability California may proceed in accordance with its own law, and it is not obligated to give full faith and credit to the applicable Arizona statutes. (*Alaska Packers Assn.* v. *Ind. Acc. Com. of California,* 294 U. S. 532, 20 I.A.C. 326; *Pac. Emp. Ins. Co.* v. *Ind. Acc. Com. (Tator),* 306 U.S. 493, 4 Cal. Comp. Cases 65).

The question whether applicant's injury has resulted in new and further disability, necessarily involves also the defense of the Statute of Limitations.

STATUTE OF LIMITATIONS

Defendants contend that applicant's present claim is barred by the Statute of Limitations (*Labor Code* sec. 5405) in that it was filed more than one year from date of injury and from date of last compensation benefits furnished. Defendants state that the medical records and reports on file indicate that applicant's complaints have been continuous and substantially the same since the date of injury and that he has never been without such complaints since the inception of injury.

Medical treatment has been furnished and temporary disability indemnity has been paid the applicant by the Arizona Commission. In the case of *Ind. Indem Exch.* v. *Ind. Acc. Com (Waggoner)* (80 Cal. App. 2d. 480, 12 Cal. Comp. Cases 119) the court considered the effect of payment made to the injured employee in Utah, and held that credit must

be given for such payment. The court stated, "Strictly speaking, compensation paid under the laws of one state is entirely independent of that under the laws of another. However, if credit is to be given in California for the Utah payments (as we are sure it should be), then the last Utah installment may properly be treated as 'payment' within the meaning of Section 5405 of the Labor Code, sufficient to toll the Statute of Limitations. If it is to be taken into account for one purpose, it should be taken into account for all purposes. For these reasons we are satisfied that the claim herein was not barred." (The application in that case was filed with the California Commission within six months of the last payment of compensation).

The benefits furnished to the applicant herein by the Arizona Commission may be taken into account for the purpose of affording the California Commission continuing jurisdiction, and applicant may institute proceedings within five years from date of injury, upon the ground that the original injury has caused new and further disability. (*California Labor Code* sec. 5410). Recognition of the original claim by the employer or his insurance carrier lays the foundation for the continuing jurisdiction of the Commission during which the injured employee may reopen for new and further disability. (*Kauffman* v. *Ind. Acc. Com.* 37 Cal. App. 500, 5 I.A.C. 132).

Applicant testified that since the termination of payments under the Arizona award he had worked in the J. B. Shelton grocery store at Parker until November, 1951, and had been taking treatment from Dr. Dennis Gallaher, in Parker, at his own expense. He testified that it just burns and hurts like a ball of fire between his hips, at all times, and his back slips out and must be manipulated into place by his doctor. At further hearing on January 7, 1953, applicant testified that this condition was growing worse; that he cannot stoop and, if on his feet as much as a couple of hours, his leg hurts so bad that he cannot stand up—the left leg more than the right, but he has pain in both hips, prior to this injury

he never had any weakness in legs or back. Until the injury his weight ran from 145 to 152 lbs.

Medical Reports:

Dennis Gallaher, M. D., of Parker, Arizona, reported under date of January 20, 1953. He recites the history of injury and states that his original diagnosis was left sacroiliac subluxation, acute tenosynovitis. The condition deteriorated and applicant was hospitalized in Phoenix. Over a period of 18 to 20 months Dr. Gallaher saw applicant go from a fairly healthy man of approximately 150 lbs. to 112 lbs., becoming unable to do any work, light or otherwise. Applicant also seemed to be suffering from chronic anemia. Dr. Gallaher was of the opinion that applicant was suffering from a herniated intervertebral disc, at the lumbo-sacral articulation, requiring surgery for its cure.

Drs. Bishop, McGrath and Moore examined applicant on May 17, 1951, for the Industrial Commissioin of Arizona. At that time applicant weighed 122 lbs. Tests made were negative for disability, but applicant had numerous complaints of pain and tenderness from the base of the skull to the lumbo-sacral area and in both buttocks, but none in the lower extremities. The examining physicians concluded that any objective evidence of disability resulting from the injury had completely cleared but that subjective complaints had increased and spread. This, with the positive evidence of malingering, strongly suggests a purely conscious exaggeration of complaints. Following this report the Arizona Commission made its Findings and Award, finding in part that the medical evidence reflects that applicant has no physical disability resulting from said accident.

Applicant was examined by Harry H. Alexander, M. D., on December 9, 1952, for the defendants, and report is in evidence. Some motions were restricted and others could be made only with complaint of pain. X-rays showed no evidence of bone injury or dislocation, but there was noted

considerable decrease in height of the lumbo-sacral disc space, with some bone sclerosis on either side and with definite encroachment upon the neural foramina; there is cloudiness of the disc space between L-4 and L-5, with some encroachment upon the neural foramina. Dr. Alexander said that he was unable to state definitely just what the patient's disability actually is; he had some findings in the low back on X-ray that would indicate possibly some radiculitis, but his reflex changes were on the opposite side from the measured atrophy. There was no demineralization or bone atrophy about the pelvis or upper femora.

Rutherford T. Johnstone, M. D., examined applicant on December 10, 1952, and report is in evidence. Dr. Johnstone concluded that from the standpoint of internal medicine the patient was suffering from a debilitating and wasting disease and it could be that the condition is a progressive muscular distrophy. The patient should be seen by a neurologist. X-ray of the chest strongly suggests the possibility of active acid fast infection, but the patient lacked the symptomotology to fit into such a diagnosis; blood sedimentation was not elevated as would be expected if the patient had active tuberculosis. Dr. Johnstone concluded that the present physical condition of the patient was not, in his opinion, related to any back strain.

Applicant was examined by Leo. J. Adelstein, M. D., on December 11, 1952, and report is in evidence. It was Dr. Adelstein's opinion that the patient seemed to be sick from some generalized cause or infection, as indicated by his asthenia, his low weight—116 lbs., his low blood pressure—115/90, and his generalized loss of muscular strength. He recommended that the patient be seen by a competent internist for a general medical check-up. There was nothing definite in the examination to indicate any focal injury or industrial accident to account for the patient's present condition.

Applicant was examined by Robert H. Ballard, M. D., of San Bernardino, for the defendants, and report dated Oc-

tober 9, 1952, is in evidence. It was Dr. Ballard's impression that applicant was suffering from a herniated intervertebral disc, probably at lumbo-sacral joint. He recommended (1) myelogram; (2) surgery.

Drs. Bishop, McGrath and Moore, on May 17, 1951, found no objective evidence of any residuals of the industrial injury and they concluded that applicant's complaints were exaggerated and in large part stemmed from conscious malingering. The Arizona Commission, upon such medical evidence, found that applicant then had no physical disability resulting from the said accident and this Commission must accept such finding as conclusive as of that date. Subsequent to that time applicant has been employed in the Shelton grocery store, at Parker, working part time over a period of several months. Following that employment his condition continued to deteriorate so that he has been unable to engage in any employment, light or otherwise. His condition has been clinically diagnosed as a ruptured intervertebral disc, both by applicant's Dr. Gallaher and by defendants' Dr. Ballard. A recurrence of disability, or change in physical condition—either an improvement or a retrogression—constitutes a "new and further disability" within the meaning of the workmen's compensation law. "A disability becomes a 'new and further' disability within the meaning of the Act when it partially or wholly prevents the employee from following his employment further, once he has returned. Any increase in symptoms which, although continuously present, were in a milder form, results in additional disability, is a new and further disability within the statutory sense. . . . A recurrent need for further medical treatment is sufficient." (*Campbell, Workmen's Compensation,* Section 1540, and cases cited).

Upon the record, the Panel concludes that applicant's injury has resulted in new and further disability. The Arizona award is not final beyond the facts therein found and is subject to be reopened in Arizona for additional com-

pensation for new and further disability. Likewise, it may be reopened in California under our applicable law.

Applicant continued with his work at the Shelton grocery store in Parker until November, 1951, when he was compelled to cease working because of increased physical disability and pain. He suffered a new and further disability from and after November 1, 1951, and is entitled to temporary total disability indemnity from that date. Claim for compensation benefits for any period prior to that date is barred by the Statute of Limitations.

Applicant procured medical treatment from Dr. Gallaher, at his own expense, and itemized statement is in evidence. The record shows that neither the employer nor the insurance carrier were contacted by the applicant with request for compensation benefits and no notice of such claim was given them, or either of them, until October 19, 1952, when Order joining the insurance carrier as a party defendant, together with copy of the Application herein, was served upon them. Applicant is entitled to be reimbursed for his expense in procuring medical treatment to cure or relieve from the effects of his injury subsequent to August 19, 1952, in the sum of $92.00, as appears upon the statement of Dr. Gallaher.

Applicant is in need of and is entitled to such further medical and surgical treatment as is reasonably required to cure or relieve from the effects of said injury, at the expense of the defendants.

Defendants are entitled to credit for the sum of $216.00 heretofore advanced to the applicant by the defendant insurance carrier.

Finding of Fact:

Sufficient cause exists to grant defendant's Petition for Reconsideration.

Conclusion of Law:

Order granting defendants' Petition for Reconsideration should issue.

Decision After Reconsideration should issue in accordance with the above.

INDUSTRIAL ACCIDENT COMMISSION

RALPH E. MUSTOE
A. RACINE
E. B. WEBB
Commissioners

Dated at Los Angeles, California
May 8, 1953

* * * * * * * * * * *

Order Dismissing Party Defendant and Findings and Award

An application for adjustment of claim for compensation having been filed herein, and all parties having appeared, and the matter having been regularly submitted for decision, SHERMAN GRANCELL, Referee, makes his Findings and Award as follows:

FINDINGS OF FACT

1. William R. Biter, born June 22, 1905, while employed as a laborer on October 19, 1950, at Parker Dam, California, by D. O. Norton & Son, sustained injury arising out of and occurring in the course of his employment to his back.

At said time, said employer's compensation insurance carrier covering said injury was United States Fidelity & Guaranty Company, and both the employer and the employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Laws of the State of California.

2. Said injury caused temporary total disability entitling applicant to $30.00 per week beginning October 20, 1950, to and including January 7, 1953, and thereafter during the continuance of disability or until the further Order of this Commission, based upon maximum earnings.

3. Applicant is in need of and entitled to such further medical and surgical treatment reasonably required to cure or relieve from the effects of said injury, at the expense of the defendants.

4. Arizona Industrial Accident Commission is neither a necessary nor proper party defendant hereto and is entitled to be dismissed and discharged herefrom.

5. Pursuant to a "Findings and Award for Temporary Disability" filed and served by the Industrial Commission of Arizona on June 4, 1951, in case No. AG 20595, applicant was paid temporary disability compensation in the sum of $512.96 during the period from October 20, 1950, through March 19, 1951. Defendants herein are entitled to credit for said payments against the amount of compensation due under this Finding and Award.

6. The Industrial Commission of Arizona is not res judicata of the rights of the parties herein.

7. The claim herein is not barred by limitations of time within the meaning of the Labor Code.

8. Applicant's attorney is entitled to a lien against unpaid compensation for the reasonable value of his services in the sum of $150.00.

Award

Award Is Made in favor of William R. Biter against United States Fidelity & Guaranty Company of the sum of $30.00 per week beginning October 20, 1950, to and including January 7, 1953, and thereafter during the continuance of disability or until the further Order of this Commission, less credit in the sum of $512.96, and less the further sum of $150.00 payable to Thomas Morris as attorney's fee; together with interest as provided by law; together with such further medical and surgical treatment as may be reasonably required to cure or relieve from the effects of said injury.

It Is Ordered that Arizona Industrial Accident Commission be and it is hereby dismissed and discharged herefrom.

It Is Further Ordered that defendant United States Fidelity & Guaranty Company report to this Commission on Form C-6, served herewith, within ten days after the cessation of compensation payments under the above con-

tinuing award. Copies of said form and copies of all reports incidental thereto are to be served on all adverse parties before filing with this Commission.

SHERMAN GRANCELL
Referee
INDUSTRIAL ACCIDENT COMMISSION

SG:SM
52 LA 129-627
2.26

Dated at Los Angeles, California
Mar. 3, 1953

FILED
MAR 15 1954
HAROLD B. WILLEY, Clerk

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 588

D. O. NORTON & SON and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM R. BITER,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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printed in CALIFORNIA STATE PRINTING OFFICE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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D. O. NORTON & SON and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM R. BITER,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the respondent Industrial Accident Commission of the State of California and respectfully submits its brief in opposition to the petition for writ of certiorari filed by petitioners D. O. Norton & Son and United States Fidelity and Guaranty Company, a corporation.

Petitioners seek to review a minute order of the California Supreme Court, filed October 15, 1953,

denying said petitioners' application for hearing. (R. 105.)

OPINIONS BELOW

On March 3, 1953, the trial referee of the Industrial Accident Commission of the State of California issued a findings and award, wherein compensation benefits were awarded William R. Biter, respondent herein, against one of the petitioners herein, United States Fidelity and Guaranty Company. (A. 21 through 23.) On May 8, 1953, the Industrial Accident Commission of California issued its Order Granting Defendants' Petition for Reconsideration and Decision After Reconsideration (A. 7 through 9), together with its Report of Industrial Accident Commission, Panel Two on Order Granting Defendants' Petition for Reconsideration and on Decision After Reconsideration (A. 9 through 21). Therein compensation benefits were awarded to respondent Biter against petitioner United States Fidelity and Guaranty Company. (A. 7 through 9.) The District Court of Appeal of the State of California, Second Appellate District, Division One, on August 19, 1953, entered a minute order denying petitioners' petition for writ of review, without opinion (119 Advance California Appellate Reports, No. 6, Minutes, p. 4; R. 65). The Supreme Court of the State of California on October 15, 1953, entered a minute order denying petitioners' application for hearing, without opinion (41 Advance California Reports, No. 23, Minutes, p. 2, R. 105).

JURISDICTION

The question presented by this proceeding is undoubtedly within the jurisdiction of the United States Supreme Court. However, as respondent will demonstrate hereinafter, the order of the Supreme Court of the State of California denying the petition for hearing wherein petitioners contested the validity of the award made in favor of respondent Biter by the Industrial Accident Commission of the State of California was in accord with applicable decisions of the United States Supreme Court relative to the full faith and credit to be accorded the compensation award made by the Industrial Accident Commission of the State of Arizona.

STATEMENT OF THE CASE

A. Preliminary Statement

Petitioners have served upon this respondent a printed document entitled "Transcript of Record" and a printed document entitled "Appendix to Petitioners' Brief." Said Transcript of Record consists of the briefs of counsel for petitioners and this respondent filed in the petition for writ of review proceedings addressed to the District Court of Appeal of the State of California, Second Appellate District, Division One, and a petition for hearing addressed to the Supreme Court of the State of California, from the order of said District Court of Appeal denying said petition for writ of review. The writ of review proceedings was directed to a Decision After Recon-

sideration of the Industrial Accident Commission of the State of California, filed May 3, 1953, wherein certain findings of fact were made and compensation benefits awarded for new and further temporary disability benefits suffered by respondent Biter for a period of time subsequent to that for which the Industrial Accident Commission of Arizona had previously awarded compensation benefits.

Said transcript of record includes only the briefs aforesaid and the exhibits contained in said briefs and the minute order of the Supreme Court of the State of California denying the petition for hearing from the minute order of the District Court of Appeal of the State of California denying said petition for writ of review. Said transcript of record does not contain the official record of the Industrial Accident Commission of the State of California, due to the fact that said District Court of Appeal did not grant petitioners' petition for writ of review and said Supreme Court did not grant a hearing after said denial order by said District Court of Appeal.

Inasmuch as said petitions for writ of review and hearing were not granted, no return of the complete trial record before the Industrial Accident Commission was made to said courts and, perforce, is not included in the record certified by the Clerk of the Supreme Court of the State of California.

Said appendix to petitioners' brief consists of certified copies of documents and excerpts from documents making up part of the official record of the

Industrial Accident Commission of the State of California, but which were not included in the briefs and exhibits contained therein, filed in said District Court of Appeal and said Supreme Court.

B. Statement of Facts

Petitioners' statement of facts as set forth at pages 3 and 4 of the petition for writ of certiorari is substantially correct for a determination of the issue presented, save for the statement that "Said new award allowed petitioners credit for payments made to respondent Biter pursuant to the Arizona award, * * * " (Page 4).

Said "new award" refers to the Decision After Reconsideration (A. 7). Said Decision After Reconsideration allowed respondent Biter compensation benefits for new and further temporary disability beginning November 1, 1951 (A. 7), whereas the Arizona commission's award allowed temporary disability benefits for a period of time ending March 19, 1951 (A. 3).

No credit for prior compensation benefits awarded by the Arizona commission was allowed by the "new award" of the California Industrial Accident Commission (A. 7 through 9), but credit was allowed therein for advances made to respondent Biter by petitioner United States Fidelity and Guaranty Company during the pendency of proceedings before the California Industrial Accident Commission. (A. 8 and R. 22).

Additionally, respondent Biter's uncontradicted testimony, contained in the record of the Industrial Accident Commission of the State of California, is to the effect that the contract of hire was entered into at Parker Dam, in the State of California:

"Q. When did you first do any work for D. O. Norton and Son?

A. Well, it was in September of 1950. * * *

Q. Where did the negotiations for this work take place? In other words, where did you talk about the Norton job?

A. On the job at the office.

Q. And where is that office?

A. At Parker Dam, California, Bureau of Reclamation, they had a little yard office * * * and that is where I found that foreman on the job.

Q. And who did you talk to there?

A. Ben Greenwood.

* * * * *

Q. What is his job or capacity?

A. Foreman or Superintendent of the job."

(Reporter's transcript of Hearing of October 6, 1952, pages 2 and 3)

SUMMARY OF ARGUMENT

1. The full faith and credit clause does not preclude the state in which the injury occurred from applying its compensation statute in its own forum in favor of the compensation statute of the state in which the employer and employee reside and in which the contract of employment may have been made.

2. Where a compensation award is not res judicata in the forum where rendered, the full faith and credit clause is no bar to the recovery of a compensation award under the compensation statute of the state where the injury occurred.

3. The Arizona compensation statute does not give an award made thereunder that degree of finality which constitutes res judicata as to the employee's rights to further benefits.

4. The California Industrial Accident Commission accorded the Arizona award precisely the same effect that it was entitled to in the forum where rendered.

5. The existence of a completely exclusive remedy provision in the Arizona compensation statute is an immaterial consideration herein.

ARGUMENT

1. The Full Faith and Credit Clause Does Not Compel the State in Which the Industrial Injury Occurred to Refuse to Apply its Express Compensation Law in Favor of the Compensation Law of the State in Which the Employer and Employee Reside and in Which the Contract of Employment May Have Been Made

It is firmly established that where the workmen's compensation statute of the state in which the employer and employee have their residence, and where the contract of employment was made, affords an industrially injured employee a remedy for an industrial injury sustained within the territorial limits

of another state, the full faith and credit clause does not preclude said state from applying its express law in favor of the law of the state in which the industrial injury occurred.

Alaskan Packers Assn. v. *Industrial Accident Commission of California,* 294 U. S. 432, 55 S. Ct. 518.

It is equally well established that where the compensation statute of the state in which the industrial injury occurred affords an industrially injured employee a remedy for said injury, the full faith and credit clause does not preclude said state from applying its express law in favor of the law of the state in which the employer and employee reside and in which the contract of employment may have been made.

Pac. Emp. Ins. Co. v. *Industrial Accident Commission of California,* 306 U. S. 493, 59 S. Ct. 629.

The above cited cases unequivocally establish that initially either the state in which the injury occurred or the state in which the employer and employee reside and in which the contract of employment was entered into, may apply the express provisions of its compensation statute in its own forum, unfettered by any restrictions imposed by the full faith and credit clause.

By reason of the later decisions of this Court in the cases of *Alaska Packers Assn.* v. *Ind. Acc. Com.*

of California (supra) and *Pac. Emp. Ins. Co.* v. *Ind. Acc. Com. of California* (supra), the case of *Bradford Electric Light Co.* v. *Clapper,*[1] cited by petitioners, has no controlling effect on the issue presented herein.

2. The Full Faith and Credit Clause Is No Bar to the Recovery of a Compensation Award In Another State Where a Prior Award of Compensation Benefits Is Not Res Judicata in the Forum Where Rendered

The full faith and credit clause does not require a state to give greater force and effect to a judgment of a sister state than is required to be given to it by the forum in which it was rendered.

People of the State of New York v. *Halvey,* 330 U.S. 610; 67 S. Ct. 903.

Where the compensation award made in the first state is not res judicata there, the full faith and credit clause is not a bar to the recovery of an award of compensation in another state.

Magnolia Petroleum Co. v. *Hunt,* 320 U.S. 430, 443; 88 L. Ed. 149; 64 S. Ct. 208, 215.

Moreover, where the compensation law of the state making the first award or the decisions of its courts thereunder do not indicate that it is designed to preclude any recovery by proceedings brought in another state under the second state's compensation law, the statute of the first state will not be interpreted so as

[1] 286 U.S. 145; 76 L. Ed. 1026; 52 S. Ct. 571.

to cut off the employee's right to sue under other legislation passed for his benefit.

Industrial Com. of Wisconsin v. *McCartin,* 330 U.S. 622, 627-28; 91 L. Ed. 1140; 67 S. Ct. 886, 889;

Ohio v. *Chattanooga Boiler Co.,* 289 U.S. 439; 77 L. Ed. 1307, 53 S. Ct. 663.

3. The Compensation Law of Arizona as Interpreted by its Courts Does Not Give an Award Made Thereunder That Degree of Finality Which Constitutes It Res Judicata as to the Employee's Right to Further Benefits

The Arizona courts have held that an award of compensation benefits made by the Arizona Industrial Commission does not thereupon exhaust its jurisdiction to modify the award, nor does it determine all of the employee's rights to compensation benefits.

> "The Workmen's Compensation Law does not specifically confer in the commission continuing power over its awards, as is the case in compensation laws generally, but we think such power is impliedly conferred by Section 1453 * * *."

Zagar v. *Industrial Commission,* 40 Arizona 479, 487; 14 P. 2d 472.

The Arizona courts have recognized the fact that the ramifications of an industrial injury cannot be fully determined and adjudicated in one award and have wisely interpreted the Arizona Compensation Law as embracing the salutary principle that an award of compensation benefits is not res judicata

of the employee's right to further benefits because of subsequent physical changes.

> "But it is common knowledge that the results of physical injuries are often not determinable at the time they are received, and to require that they be then stated is to demand the performance of the impossible. The original award is not final in the sense that, regardless of the future physical condition of the workman, neither he nor the insurer should be permitted to show such physical change. *For this reason the Commission not only has the right, but it was its legal duty to retain jurisdiction of the case for further action and award if the facts should so warrant.*" (Italics ours.)
>
> *Zagar* v. *Industrial Commission,* 40 Arizona 479, 486-87, 14 P. 2d 472.

A failure to appeal the original award of compensation benefits does not divest the Arizona Industrial Commission of its jurisdiction to entertain a claim for and award additional compensation benefits for subsequent physical changes.

> "When the award becomes final by failure to appeal, *it is res judicata as to all matters determined thereby.* The award must be considered as in full and complete satisfaction for the injury *as it exists at the time* of the award." (Italics ours.)
>
> *Radaca* v. *U. S. Smelting R. & M. Co.,* 62 Arizona 464, 472; 158 P. 2d 540.

4. The Award Made by the California Industrial Accident Commission Accorded the Award of the Arizona Industrial Commission Precisely the Same Effect That It Was Entitled to in the Forum Where Rendered

The compensation award made by the Arizona Industrial Commission allowed the injured employee compensation benefits for temporary disability from October 20, 1950, to February 17, 1951, and from February 18, 1951, through March 19, 1951 (A. 3), and medical benefits until May 18, 1951. (A. 2.)

The compensation award of the California Industrial Accident Commission allowed the injured employee further compensation benefits for *new and further temporary disability* beginning November 1, 1951, to and including January 7, 1953, and thereafter (A. 7), together with *further* medical and surgical treatment. (A. 8.)

It is thus clear that the California Industrial Accident Commission supplemented the original Arizona award because of a physical change manifested subsequent thereto, in precisely the same manner that the Arizona Industrial Commission was jurisdictionally authorized to do under its statute.

The requirements of full faith and credit do not stand as a bar to the right of the state of the forum to exercise as much leeway to disregard the award, to qualify it, or to depart from it as does the state where it was rendered.

People of the State of New York v. *Halvey,* 330 U. S. 610; 67 S. Ct. 903;

Magnolia Petroleum Co. v. *Hunt,* 320 U. S. 430, 443; 88 L. Ed. 149; 64 S. Ct. 208, 215;
Industrial Com. of Wisconsin v. *McCartin,* 330 U. S. 622; 91 L. Ed. 1140; 67 S. Ct. 886.

5. The Existence of a Completely Exclusive Remedy Provision in the Arizona Compensation Statute Is an Immaterial Consideration Herein

Fundamentally petitioners seek to bring the facts of this case within the purview of the allegedly conflicting decisions of this court in the cases of *Magnolia Petroleum Co.* v. *Hunt*[2] *and Industrial Com. of Wisconsin* v. *McCartin.*[3] An analysis of those two cases, however, makes it quite clear that any conflict that might be said to exist between those decisions is not applicable to the facts of the case under consideration.

The two decisions do no more than determine the applicability of the full faith and credit clause to awards made under the differing provisions of the compensation laws of the States of Texas and Illinois. This court's decision in the *McCartin* case further points out the clarity with which the completely exclusive remedy provision of particular state's compensation statute must be expressed by the state legislature or judiciary before the full faith and credit clause will be held operative to preclude another state from awarding the injured employee the benefits provided by its compensation statute.

[2] 320 U. S. 430; 88 L. Ed. 149; 64 S. Ct. 208.
[3] 330 U. S. 622; 91 L. Ed. 1140; 67 S. Ct. 886.

In the *Magnolia* decision this court held:

> " * * * that the compensation award under the Texas Workmen's Compensation Law, * * * was made explicitly in lieu of any other recovery for injury to the employee, precluding even a recovery under the laws of another state."
>
> *Industrial Com. of Wisconsin* v. *McCartin,* 330 U. S. 620, 626; 88 L. Ed. 149; 67 S. Ct. 888, 889.

In the *McCartin* decision this court held, with reference to the Illinois Compensation Law, that (page 627):

> " * * * there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, is designed to preclude any recovery by proceedings brought in another state for injuries received therein in the course of an Illinois employment."

and that (page 627):

> "* * * in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted * * * we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. *Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play."* (Italics ours.)

The award of the Arizona Industrial Commission, by its express reservation of jurisdiction therein "to *alter, amend* or *rescind* this award upon good cause" (A. 3) precluded it from becoming res judicata of *all* the rights of the parties thereto in the forum where rendered, and is only declaratory of the judicial interpretation pertaining thereto pronounced by the Arizona judiciary. It necessarily follows that since no final adjudication of all the employee's rights under the Arizona compensation statute had been made, an inquiry into the existence or nonexistence of a completely exclusive remedy provision in the Arizona statute is wholly immaterial, as there is no final Arizona award in existence which could bring the full faith and credit clause into play.

CONCLUSION

The full faith and credit clause as it applies to final awards may not be invoked herein as there has been no final award rendered under the Arizona compensation statute which is res judicata of all the rights of the injured employee. The full faith and credit clause is no bar to the right of the state where the injury occurred to apply its own compensation statute in its own forum.

The principles of constitutional law applicable to the facts herein unequivocally establish that the Supreme Court of California did not fail to accord to the compensation award of the State of Arizona the full faith and credit to which it was properly entitled, in denying petitioners' petition for hearing.

For the reasons hereinbefore set forth, it is respectfully urged that the petition for writ of certiorari be denied.

Dated: San Francisco, California
March 15, 1954.

Respectfully submitted,

EVERETT A. CORTEN
Attorney for Respondent
Industrial Accident Commission
of the State of California

T. GROEZINGER
Of Counsel

o

FILED
MAR 31 1954
HAROLD B. WILLEY, Clerk

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IN THE

Supreme Court of the United States

October Term, 1953

No. 598

D. O. NORRIS & SON and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, *Petitioners*,

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM B. BUSH, *Respondents*.

PETITIONERS' REPLY BRIEF

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Robert B. Brown,
C. Hubert Wagnon,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 588

D. O. NORTON & SON and UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, *Petitioners*

v.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM R. BITER, *Respondents*

PETITIONERS' REPLY BRIEF

Respondent Industrial Accident Commission of the State of California, on page 5 of its brief in opposition to petitioners' petition for Writ of Certiorari, refers to the statement of facts set forth in Petitioners' original brief. Respondent calls attention to that section of the statement of facts wherein Petitioners recited that the "new award" of May 8, 1953 of the Industrial Accident Commission of the State of California allowed a credit for the amount of compensation covered by the Arizona award. Respondent's statement is correct that the "new award" did not allow a credit for the amounts paid pursuant to the Arizona award.

The California Commission entered two awards, the first dated March 3, 1953 and the second May 8, 1953. The award of March 3, 1953 (A21) found as a fact that:

> "2. Said injury caused *temporary total disability* entitling applicant to $30.00 per week beginning October 20, 1950 to and including January 7, 1953 and thereafter during the continuance of disability or until the further order of this Commission, based upon maximum earnings." (Emphasis added).

California allowed a credit in this award for the amount paid pursuant to the Arizona award (A22).

The award of May 8, 1953 provided:

> "Reconsideration having been granted and it appearing to the satisfaction of this Commission that ***no good cause exists for the taking of further testimony*** and the original cause having been considered and re-determined upon the existing record, ..." (A7) (Emphasis added)

The award thereupon rescinded the findings and award of March 3, 1953 and substituted for the paragraph quoted, supra, from said award the following:

> "2. Said injury resulted in *new and further disability*, causing temporary total disability entitling applicant to $30.00 per week beginning November 1, 1951 to and including January 7, 1953 and thereafter during the continuance of disability or until the further order of this Commission, based upon the maximum earnings." (A7) (Emphasis added).

The record, therefore, shows that the "new and further disability" found by the California Commission in its award of May 8, 1953 was based upon no new evidence and was supported by no additional testimony. Respondent relies upon the "new and further disability" to argue that the California claim was not barred by the Arizona award because the disabilities were entirely separate and distinct.

Petitioners wish to emphasize that the evidence support-

ing each award of the California Commission was identical and the change in theory of the Respondent Commission was only a legal change, unsupported by any additional testimony or facts.

The original California award of March 3 as quoted above allowed "temporary total disability" from October 20, 1950 to and including January 7, 1953 and denied Petitioners' assertion made therein that Respondent Biter's claim was barred by the Statute of Limitations. (A 22). The award of May 8 allowed the assertion of Petitioners that the claim was barred by the Statute of Limitations insofar as were concerned claims for compensation benefits prior to November 1, 1951 and said award further allowed compensation from November 1, 1951 to January 7, 1953 for "new and further disability" being temporary total disability (A 7).

Petitioners submit that the "new and further disability" first "found" in the award of May 8 is completely unsupported by any evidence as is illustrated by the fact that the Respondent Commission on March 3, 1953 having before it the same set of facts as on May 8 found no new and further disability.

Petitioners submit that the amended finding was made only for the purpose of avoiding the clear and unmistakable restrictions imposed by this Court in the Magnolia Petroleum Co. case, 320 U. S. 430, 88 L. Ed. 149, 64 Sup. Ct. 208.

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